

MAR 19 2008

Manning v. Mukasey, No. 05-76578

LARSON, District Judge, dissenting:

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

I respectfully dissent.

I agree with the majority's conclusion that the Court should apply the modified categorical approach to determine if petitioner was convicted of an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M)(i). I also agree with the majority's conclusion that, absent a specific manifestation of the parties' intent to incorporate the findings of the PSR as part of the factual basis of the plea, the Court may not rely on the facts set forth therein.

However, unlike the majority, I would conclude that petitioner's admission during the plea colloquy that she was not authorized to enter into the relevant transactions is an admission that she committed an offense "involving fraud or deceit." Viewed in the context presented by the documents of conviction, by admitting she made unauthorized transactions, petitioner necessarily admitted that either she had no authority to make the transfers or she exceeded the authority delegated to her by her employer to make the transfers. In either circumstance, to effectuate those transfers, she would have by necessity made either an affirmative representation that she was authorized to do so, or she would have made a material omission by failing to disclose that she was not authorized to do so. Either of those

alternatives involve deceptive conduct. Bobb v. Attorney General, 458 F.3d 213, 218 (3d Cir. 2006) (noting that the Third Circuit has held that Congress intended 8 U.S.C. § 1101(a)(43)(M)(i) to have a broad scope because the provision refers to an offense that “*involves* fraud or deceit”) (emphasis in the original); Black’s Law Dictionary 435 (8th ed. 2004) (defining “deceit” as “[t]he act of intentionally giving a false impression”).

Because I believe that the documents of conviction unequivocally establish that petitioner pleaded guilty to every element of the generic crime as defined in 8 U.S.C. § 1101(a)(43)(M)(i), I would deny the petition for review.